

## Governor's Executive Order and the Flexibility to Adjust Water Right Terms and Conditions Derived from the Bay-Delta Plan

### Short Message

The Governor's Executive order provides flexibility for the State Water Board to temporarily adjust water rights permit terms designed to meet Bay-Delta water quality standards in light of extremely dry conditions. When the State Water Board exercises this flexibility, it will still need to take actions that are in the public interest—considering the interests of water users and the environment.

### Slightly Longer Message

The Governor's action allows the Water Board to take sensible and prudent action to deal with the extraordinarily dry conditions we are facing today to be better prepared for a year that may stay dry.

The Governor's action temporarily eliminates a procedural roadblock to the Water Board's ability to make adjustments to water rights permits that implement Delta Water Quality Standards. These standards determine the timing and amount of flows through the Delta. Standards for flow and other actions are set to protect fish and wildlife, water supply, water quality and other needs based on the usual swing of dry to wet circumstances. However, in the current extraordinary conditions, sensibly protecting these interests requires making adjustments in the flow required at certain times to allow greater protection of fish, wildlife, and water users through the remainder of the year.

In these circumstances, for example, the Water Board could adjust the amount of flow required to be released from upstream reservoirs now, to save water to better protect fish and water users later in the year, or make other adjustments to the implementation of the standards that make sense. The decisions would be based on protecting the public interest, including water users and the environment.

### Background

The Governor's Executive Order suspends Water Code section 13247 and the California Environmental Quality Act (CEQA) for two limited purposes. The first purpose is to allow the State Water Board to expedite consideration of requests to consolidate the places of use of the State Water Project and the Central Valley Project. This will allow the expediting of water transfers using available water from the two projects. The second purpose is to allow flexibility for the State Water Board as it considers requests to adjust water right permit conditions that were originally established to implement Bay-Delta water quality standards. Primarily, these water quality standards and their corresponding water right permit conditions were designed to ensure a certain quantity of water was flowing through the Bay-Delta at certain times of year but was not designed for the extraordinary circumstances we find ourselves in today.

### Why does the Governor's Executive Order do this?

Water Code section 13247 serves as a barrier to taking the action necessary to address this extraordinarily dry year. Water Code section 13247 says:

State offices, departments, and boards, in carrying out activities which may affect water quality, shall comply with water quality control plans approved or adopted by the state board unless otherwise directed or authorized by statute, in which case they shall indicate to the regional boards in writing their authority for not complying with such plans.

The Bay-Delta Water Quality Control Plan specifies that the State Water Board will use water rights permits to implement certain water quality requirements. A California Court of Appeal has previously held that Water Code section 13247 compels the State Water Board to follow the Bay-Delta Water Quality Control Plan when it exercises its water rights authority. Without the flexibility afforded by the Governor's Executive Order, the State Water Board would be compelled to follow the Bay-Delta Water Quality Control Plan as it is written and could not adjust water rights in the public interest and consistent with other laws.

As a consequence of some of these requirements, the State Water Project and the Central Valley Project would need to continue releasing water through the spring and the summer to meet the Bay-Delta Water Quality Control Plan requirements. Continuing these releases would mean that sufficient water will not be available later in the year to provide cold water for fish as well as balancing out water supplies. The Projects believe they can adjust their reservoir release to maintain sufficient cold water for later in the year, while still protecting other interests.

Providing flexibility in this way is not unprecedented. Governor Schwarzenegger created similar flexibility in his 2009 drought proclamation, which was used to consolidate the place of use for the State Water Project and Central Valley Project to more rapidly facilitate water transfers.

Last month, the Sonoma County Water Agency requested a change to their permit conditions to reflect the very dry conditions and low storage levels in Lake Mendocino which is less than 42% of the available winter supply and 26% of the summer supply. Since the water rights permits for Sonoma County Water Agency are not controlled by a Water Quality Control Plan, the State Water Board was able to approve this temporary change and adjust the permit conditions to reflect current conditions within two weeks of submittal. With the approved change, Sonoma County Water Agency will be able to hold more water in storage for later release to the Russian River for fish protection and public interest uses (or human health and welfare).

**What will be the effect of the Governor's action?**

The Governor's action is limited and only suspends Water Code section 13247 for the specific proceedings before the State Water Board. In considering requests to make adjustments, the State Water Board will still need to act in the public interest. As part of this, the State Water Board will need to recognize existing water rights priorities; ensure that fish and wildlife are not unreasonably affected; and that there is no legal injury to other water users during the time of the temporary changes. Essentially, the State Water Board will develop temporary requirements for the water rights permits as appropriate to steward limited water supply wisely through the drought.